IN THE COURT OF APPEALS OF ERIE COUNTY

State of Ohio — **Court of Appeals No. E—96-033**
Appellee — **Trial Court No. 95-CR-371**

v.

Ollie Mastronardi — **OPINION and JUDGMENT ENTRY**
Appellant — **Decided: December 5, 1997**

* * * * *

Kevin J. Baxter, prosecuting attorney, and
Mary Ann Barylski, for appellee.

Lawrence J. Whitney, for appellant.

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KNEPPER, J. This is an appeal from appellant's judgment of conviction for vehicular homicide and involuntary manslaughter and his sentences of incarceration therefor. Appellant's convictions arise out of the watercraft collision, occurring on June 24, 1995, near Kelley's Island, Ohio, which took the life of Scott Brabander. For the reasons that follow, this court finds Ollie Mastronardi's appeal well-taken, in part, and not well-taken, in part.

Appellant was indicted on July 7, 1995, in Count One for aggravated vehicular homicide while using a watercraft, in violation of R.C. 2903.06(A), an aggravated felony of the third degree. Appellant was indicted in Count

Two for involuntary manslaughter, in violation of R.C. 2903.04(B), an aggravated felony of the third degree, for having caused the death of Scott Brabander as a proximate result of committing one or more of the following misdemeanor offenses: operating a watercraft while under the influence, in violation of R.C. 1547.11(A) (1); reckless operation, in violation of R.C. 1547.07; safe speed, in violation of Ohio Adm.Code 1501:47-2-06; action to avoid collision, in violation of Ohio Adm.Code 1501:47-2-08; and crossing situation, in violation of Ohio Adm.Code 1501:47-2-15.

Two motions to suppress were filed and came for hearing on February 1, 1996. In his first motion to suppress, appellant asserted that the statements obtained on June 24, 1995 by Officer John P. Johnston of the Ohio Department of Natural Resources ("ODNR") Watercraft Division should be suppressed as the statements were acquired during custodial interrogation without appellant's Miranda rights being explained and/or without a waiver of these rights. In his second motion to suppress, appellant argued that the responses he gave during a "field sobriety test" should be suppressed as they were incriminating and made before he was read his Miranda rights.

After conducting a hearing on appellant's motions to suppress, the trial court sustained in part and overruled in part appellant's first motion to suppress, finding:

> "Said motion to suppress as to statements made by defendant prior to receiving Miranda warnings is granted, with the exception of the defendant's responses as to who owned the boat and who operated the boat;

As a result of his convictions, appellant was sentenced to a definite sentence of six months as to the vehicular homicide (R.C. 2903.07) charge, while under the influence of alcohol, and to an indeterminate sentence of not less than five years nor more than ten years as to the involuntary manslaughter (R.C. 2903.04) conviction which resulted from the commission of the following misdemeanors: operating a watercraft under the influence of alcohol; crossing situation; action to avoid collisions; safe speed; and reckless operation. These sentences were run concurrently.

The evidence which gave rise to appellant's convictions can be summarized as follows. On June 24, 1995, appellant was operating his Top Gun Cigarette boat in conjunction with a poker run.[1] After getting his boat and filling it with gas, appellant and Ron Liguzinski went to the Casino restaurant/bar on Kelley's Island between 10:30 and 11:00 a.m. While at the Casino, Bob Vitt saw

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[1]A poker run in this setting is an event whereby the participants travel from marina to marina collecting cards. At the end of the event, the participant with the best poker hand wins. This poker run was not a race.

appellant drink two Sidecars.[2] Appellant and Liguzinski left the Casino with Sheila Sikora and her friend between 11:30 a.m. and 12:30 p.m.

Appellant next went to the Twine House located on the Huron River. While at the Twine House, the bartender, Rory Kaip, served appellant and Liguzinski each a Sidecar. Appellant, Liguzinski, Sandra Hooper, and Luanne Borders left the Twine House around 3:15 p.m., heading back to the Casino at Kelley's Island.

Meanwhile, Scott Brabander was on his family's Wellcraft with his father, his mother, and his friend Rodger. The Brabanders testified that they had decided to stop at Kelley's Island. When they arrived, the dock area was very congested. According to the dock master, Bryce Keesee, he told the Brabanders on the Wellcraft that he was trying to find them a dock. The Wellcraft was idling parallel to the eastern-most dock with its bow pointing south.

At this point, approximately 3:30 p.m., appellant's boat was spotted between one hundred yards and one-quarter of a mile from the dock at Kelley's Island, traveling between forty- five and fifty m.p.h. Witnesses for the state testified that appellant's boat slowed to twenty-five to forty m.p.h., between two to four boat lengths from the Wellcraft. The Cigarette boat then hit the Wellcraft's port side, flew

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[2]Sidecar is an alcoholic beverage consisting of Brandy, Triple Sec, sour mix, and soda water.

over the Wellcraft, and landed in the water on the other side between the dock and the Wellcraft.

The occupants of the Wellcraft attempted to jump off prior to the collision. Mr. and Mrs. Brabander escaped unharmed into the water; however, Scott died as a result of a blunt force to his back which broke twelve ribs, thereby lacerating his pulmonary artery and airway. Rodger remained on the Wellcraft unharmed.

Following the collision, appellant was taken into custody by the ODNR and a field sobriety test was administered. Appellant failed the tests and was then arrested. Appellant declined to take a breathalyzer, but his blood was drawn approximately ten and one-half hours after the collision. No alcohol or drugs were found in appellant's blood sample.

On appeal, appellant asserts the following fourteen assignments of error:

"**ASSIGNMENT OF ERROR NUMBER ONE**

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR WHEN IT SENTENCED APPELLANT PURSUANT TO TWO (2) COUNTS OF THE INDICTMENT THAT WERE ALLIED OFFENSES OF SIMILAR IMPORT PURSUANT TO R.C. 2941.25

"**ASSIGNMENT OF ERROR NUMBER TWO**

"APPELLANT WAS DENIED HIS RIGHTS AS GUARANTEED BY THE FOURTH, FIFTH AND

FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 14 OF THE OHIO CONSTITUTION WHEN SELECTED CUSTODIAL PRE MIRANDA WARNING REMARKS WERE RULED ADMISSIBLE BY THE TRIAL COURT

"ASSIGNMENT OF ERROR NUMBER THREE

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR BY ABUSING ITS DISCRETION WHEN THE TRIAL COURT FAILED TO GRANT A DEFENSE MOTION FOR CONTINUANCE OF TRIAL DUE TO (1) THE ILLNESS OF A DEFENSE WITNESS AND (2) BLATANT DISCOVERY VIOLATIONS IN CONTRAVENTION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND OHIO CRIMINAL RULE 16

"ASSIGNMENT OF ERROR NUMBER FOUR

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR BY PERMITTING STATE'S WITNESSES TO TESTIFY ON MATTERS BEYOND THAT WHICH THEY WERE QUALIFIED TO TESTIFY IN CONTRAVENTION OF APPELLANT' S

RIGHTS PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION *AND OHIO EVIDENCE RULE 702*

"**ASSIGNMENT OF ERROR NUMBER FIVE**

"THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT ACCEPTED THE INCONSISTENT JURY VERDICTS RETURNED IN THIS CASE

"**ASSIGNMENT OF ERROR NUMBER SIX**

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR WHEN IT PRESENTED THE JURY WITH AN UNINDICTED, 'ADDITIONAL FINDING' IN CONTRAVENTION OF CRIM. R. 7(D) AND THE DUE PROCESS CLAUSES OF BOTH THE UNITED STATES AND OHIO CONSTITUTIONS

"**ASSIGNMENT OF ERROR NUMBER SEVEN**

"THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR BY

ALLOWING THE PROSECUTING ATTORNEY TO QUESTION A PROSPECTIVE JUROR ON MATTERS BOTH UNRELATED TO THAT PROSPECTIVE JUROR'S FAIRNESS AND IMPARTIALITY AND PREJUDICIAL TO APPELLANT IN CONTRAVENTION OF CRIM. R.24(A), OHIO TRIAL COURT JURY USE AND MANAGEMENT STANDARD 7(A) AND (C), AS WELL AS THE DUE PROCESS CLAUSES CONTAINED IN BOTH THE UNITED STATES AND OHIO CONSTITUTIONS

"**ASSIGNMENT OF ERROR NUMBER EIGHT**

"THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER THE SENTENCING CRITERIA OF R.C. 2929.12 IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF INCARCERATION PERMITTED BY LAW

"**ASSIGNMENT OF ERROR NUMBER NINE**

"THE TRIAL COURT COMMITTED PREJUDICIAL, REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO DISMISS COURT TWO, INVOLUNTARY MANSLAUGHTER, AND PERMITTED THE STATE TO PROSECUTE APPELLANT FOR BOTH AGGRAVATED VEHICULAR HOMICIDE AND INVOLUNTARY MANSLAUGHTER'S [sic] THE

INCLUSION OF BOTH CHARGES VIOLATED APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 2, 9 AND 16 OF THE OHIO CONSTITUTION

"**ASSIGNMENT OF ERROR NUMBER TEN**

"APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT ALLOWED TESTIMONY REGARDING APPELLANT'S CHARACTER IN EVIDENCE IN DIRECT CONTRAVENTION OF OHIO EVID.R. 401, 402, 403 AND 404

"**ASSIGNMENT OF ERROR NUMBER ELEVEN**

"THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO CROSS-EXAMINE DEFENSE WITNESSES BY USE OF GRAND JURY TRANSCRIPTS, WHICH USE VIOLATED THE SECRECY OF THE GRAND JURY AND DENIED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE

FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE' UNITED STATES CONSTITUTION

"**ASSIGNMENT OF ERROR NUMBER TWELVE**

"THE APPELLANT WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHEN THE STATE ALTERED THE POSITIONING OF THE CONTROLS OF APPELLANT'S WATERCRAFT AND TAMPERED WITH THE EVIDENCE

"**ASSIGNMENT OF ERROR NUMBER THIRTEEN**

"THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AND THUS THE VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW

"**ASSIGNMENT OF ERROR NUMBER FOURTEEN**

"THE CUMULATIVE AFFECT [sic] OF THE PREVIOUSLY RAISED PRELIMINARY ASSIGNMENTS OF ERROR IS SUCH THAT APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION"

I.

In appellant's first assignment of error, he asserts that the trial court incorrectly sentenced him for two allied offenses in violation of R.C. 2941.25(A). Appellee asserts that because the trial court ordered the sentences to run concurrently, the offenses merged and, therefore, there was no error with respect to sentencing.

"Sentencing is within the sound discretion of the trial court and is generally not disturbed upon review where the sentence is within the confines of the valid statute." Columbus v.Jones (1987), 39 Ohio App.3d 87, 88, citing, Toledo v. Reasonover (1965), 5 Ohio St.2d 22. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. State v. Adams (1980), 62 Ohio St.2d 151, 157.

R.C. 2941.25(A) states that a defendant can be indicted for two or more allied offenses, but can be convicted of only one:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

In State v. Chippendale (1990), 52 Ohio St.3d 118, 122, the Ohio Supreme Court found that "where the

legislative intent is manifest that general and special provisions be applied coextensively and where the provisions are allied offenses of similar import, then the prosecution may charge on and try both, but the defendant may be sentenced upon his or her conviction for only one of the offenses." An allied offense is one where "the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other ***." Newark v. Vazirani (1990), 48 Ohio St.3d 81, syllabus.

As in this case, the defendant in Chippendale was charged with both aggravated vehicular homicide and involuntary manslaughter. Also, identical to this case, the jury found defendant guilty of both involuntary manslaughter and vehicular homicide, a lesser-included offense of aggravated vehicular homicide. The trial court, however, only sentenced Chippendale on the involuntary manslaughter conviction. The Ohio Supreme Court held that "the prosecution properly charged Chippendale under both of these offenses and the trial court properly sentenced Chippendale on only one of these offenses, albeit on the offense carrying a greater penalty." Chippendale at 123.

In this case, the offenses for which appellant was charged were allied offenses in that they occurred in one series of events, there was only one animus, and there was only one set of circumstances which caused one collision and one death. See Id. As such, we find that the trial court

erred in sentencing appellant on both the vehicular homicide and involuntary manslaughter convictions. See R.C. 2941.25(A). We further find that running the sentences concurrently does not avoid the fact that appellant was sentenced on both counts as such is clearly prohibited.

Appellant asserts that since the trial court incorrectly sentenced appellant, the matter cannot be cured by this court or remanded for resentencing because it would allow the state to elect which charge to pursue. Appellant's argument is that giving the state the option to select a charge would violate appellant's rights to be tried on the same facts on which the grand jury found probable cause and would "defeat [his] right to presentment protected by the Fifth Amendment of the United States Constitution." This court does not agree.

Sentencing matters lie within the sound discretion of the trial court, Columbus v. Jones. supra, not the state. Moreover, this discretion permits the trial court to decide upon which offense to sentence. See Chippendale at 123 ("the trial court properly sentenced Chippendale on only one of these offenses, albeit on the offense carrying a greater penalty.")

Based on the foregoing, this court finds that the trial court abused its discretion in sentencing appellant on both convictions. Accordingly, this matter is remanded to the trial court for resentencing in accordance with this opinion

and Chippendale. Appellant's first assignment of error is, therefore, found well-taken.

II.

In appellant's second assignment of error, he asserts that the trial court erred in admitting the results of appellant's field sobriety test as the test required verbal responses from appellant and he had not been informed of his Miranda rights prior to the test's administration.

In pertinent part, at the suppression hearing, Petty Officer William Kontz testified that he questioned appellant regarding who owned the boat, who was operating the boat, and whether he had consumed any alcoholic beverages that day. Thereafter, appellant was removed from his boat and taken to the Kelley's Island police station. Kontz testified that appellant was not advised of his Miranda rights; however, he was informed that he could refuse to submit to a field sobriety test and a breathalyzer test (Alcohol Sensory III test). Appellant submitted to the field sobriety test; however, he refused a breathalyzer test. During the field sobriety test, appellant was asked to do the following: recite the ABC's without singing; count from twenty-five to one in descending order; count his fingers from one to four and then from four to one by touching his thumb to his fingertips; pat his palms together; touch his finger to his nose; walk and count out nine steps, turn, and return for nine steps; stand on one-leg while counting from one

thousand one to one thousand thirty in ascending order; and submit to a horizontal gaze nystagmus test.

Generally, the nonverbal results of field sobriety tests are not self-incriminating statements subject to Miranda warnings. State v. Henderson (1990), 51 Ohio St.3d 54, 57-58. The issue then becomes whether the verbal responses elicited during a field sobriety test are testimonial responses to interrogation which would invoke one's privilege against self-incrimination.

With respect to an individual's privilege against self-incrimination, the United Supreme Court has held that "'the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.'" Pennsylvania v. Muniz (1990), 496 U.S. 582, 591, citing Miranda v. Arizona (1966), 384 U.S. 436, 764. Accordingly, physical characteristics, such as one's manner of speech, i.e., slurred speech, blood alcohol level, fingerprints, photograph, handwriting, voice, stance, walk, or gesture, are not "testimonial" responses to which the privilege applies. In Muniz, the court found that a defendant's physical inability to articulate words in a clear manner, due to the lack of muscular coordination of his tongue and mouth, is not itself a testimonial component of a defendant's response to an officer's questions. "Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical

properties of the sound produced by his voice, *** does not, without more, compel him to provide a 'testimonial' response for purposes of the privilege." Muniz at 592.

In Muniz, the United States Supreme Court found that Muniz's response to what was the date of his sixth birthday should be suppressed because the response to that question could itself be incriminating, since failure to correctly answer could mean that he was too confused to answer because he was under the influence, or he was lying. With respect to Muniz's ability to count aloud while performing certain field sobriety tests, the court found that "Muniz's counting at the officer's request qualifie[d] as a response to custodial interrogation;" however, because he correctly counted, his verbal response to the "instruction [to count] was not incriminating except to the extent that it exhibited a tendency to slur words, which we have already explained is a nontestimonial component of his response." Muniz. supra at footnote no. 17.

In the case sub-judice, appellant has not argued that the content of his responses was incriminating. Had appellant been unable to count or if he had been analphabetic, then perhaps his responses would have been incriminating; however, the content of appellant's responses was accurate. The only incriminating aspect of appellant's responses was the manner in which he spoke them, e.g., he sang the ABC's and hesitated while counting. As set forth above, the manner in which one speaks is nontestimonial

and does not invoke one's privilege against self-incrimination. Accordingly, there was no requirement that appellant be advised of his Miranda rights prior to the administration of the field sobriety test.

This court finds that the trial court correctly denied appellant's motion to suppress the results of appellant's field sobriety test. Appellant's second assignment of error is therefore found not well-taken.

III.

In his third assignment of error, appellant asserts that the trial court abused its discretion in not granting him a continuance of the trial. Appellant requested a continuance because: (1) Sandra Hooper, a key defense witness, was medicated at the time of the trial and would have suffered a significant hardship in coming to the trial during her treatment and, because of her medication, she would have trouble recalling certain events concerning the accident; and (2) the defense did not receive the original video tape taken of defendant's boat until one week prior to trial, thus precluding appellant's witness from conducting an in-depth analysis of the tape.

The decision to grant or deny a motion for continuance is within the sound discretion of the trial court. State v. Sowders (1983), 4 Ohio St.3d 143, 144. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion. State v. Unger (1981), 67 Ohio St.2d 65, 67.

In deciding a motion for continuance the trial court may consider the following factors: (1) the length of delay requested; (2) the number of continuances already requested; (3) the inconvenience to litigants, witnesses, opposing counsel and the court; (4) whether the defendant contributed to the circumstance giving rise to the request for a continuance; and (5) other relevant factors depending on the facts of the case. Id. at 67-68. See, also, State v. Landrum (1990), 53 Ohio St.3d 107, 115. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.'" State v. Denson (1990), 66 Ohio App.3d 833, 836, citing, Ungar v. Sarafite (1964), 376 U.S. 575, 589. "'The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" Id.

In this case, Hooper's physician, Dr. Joseph P. Myers, indicated in a letter, dated April 15, 1996, that, in his opinion, "Hooper's health would best be served by her not having to testify in court in the next two weeks." Dr. Myers further stated, "It is unlikely that the medication that she is presently taking would adversely effect [sic] her mental capacity, however, there have been reported cases of encephalopathy (inability to think accurately could accompany this) related to intravenous Ceftriaxone."

With respect to the video tape, although appellant received in discovery a composite copy of two original

video tapes, it was not discovered until sometime later that the defense was not in possession of the originals. When this was discovered, appellant requested to see the original containing the ODNR examination of appellant's boat, done the day after the collision. Due to the state's need to examine the original itself, the original tape was not provided to the defense for analysis until approximately April 18, 1996. Appellant asserted that his expert required thirty hours to conduct an analysis of the tape. The trial court denied appellant's request for a continuance of the April 22, 1996 trial date.

This court finds that the trial court did not abuse its discretion in denying appellant's request for a continuance. Hooper did not testify until May 3, 1996, which was several days past the two week period Dr. Myers suggested Hooper not testify. Additionally, Dr. Myers did not say that Hooper suffered from an inability to think accurately while on her medication, only that it may happen. Furthermore, with respect to the original video tapes, defense expert, Steven Caine, did not testify until May 6, 1997; therefore, at a minimum, Caine had eleven business days to complete thirty hours of examination.

Although the trial court would not have known the exact dates these witnesses would be testifying, we find that the trial court did not abuse its discretion by denying appellant's request for continuance of the April 22, 1996

trial date. Appellant's third assignment of error is therefore found not well-taken.

IV.

In his fourth assignment of error, appellant argues that the trial court erred by permitting appellee's lay witnesses to testify as experts and offer expert opinions. Specifically, appellant asserts that although they were not qualified as experts to do so, three of appellee's witnesses, Mike Benfer, Scott Smith and Daniel Clarkson, testified that appellant's watercraft functioned properly.

In support of his argument, appellant relies on Hatfield v. Andermatt (1988), 54 Ohio App.3d 188. In Hatfield, the court found that the trial court erred in allowing a police officer who was not present at the scene, nor qualified as an expert in accident reconstruction, to testify regarding the proximate cause of the accident, how the accident occurred, and who was negligent. Hatfield is distinguishable from this case because Benfer, Clarkson, and Smith did not offer opinions as to what was the proximate cause of the collision or whether appellant was negligent. Rather, each witness was examined on matters within their field of expertise.

Benfer was a service manager at Winke's boat storage on Catawba Island, where the boats were stored immediately after the collision. Prior to being a service manager, Benfer was a mechanic for four years at Winke's. As a service manager, Benfer was responsible for getting

the customers' complaints into a logical format, so the mechanics could understand what the problem was, and do troubleshooting concerning the mechanical problem. Benfer underwent specialized training in marine technologies in high school and went to factory authorized technical schools put on by engine manufacturers of marine engines every winter thereafter for seventeen years. Benfer received over twenty certified mechanic certificates from these training schools, including a number from MerCruiser, the most recent being February 9, 1994, for stern drives and inboards. At the time of trial and at the time of the incident, Benfer was a certified mechanic for MerCruiser.

Benfer testified that after the collision he was asked by ODNR to examine appellant's Cigarette boat to determine if there was any problem with the throttles. Upon examination of appellant's boat, Benfer testified that the only control problems he found with the boat was that the starboard drive shifted into reverse with a little difficulty a couple of times. He found nothing wrong with either the throttles or the port drive. Benfer was then asked the following hypothetical by the state:

> Q. "I want to describe a hypothetical in which a 28 foot Wellcraft is located 65 feet and pointed in a south to southwest direction 65 feet off the eastern marina sea wall at the Casino marina. ***"

Q. "I want to also in that hypothetical describe the situation where a Top Gun Cigarette boat is coming from a southeasterly direction or from a direction of Sandusky or Huron ***."

Q. "And I also want within that hypothetical can you assume that the Cigarette boat literally runs over, launches over the port, front port side of the Wellcraft boat ***.'

Q. "Now, Mr. Benfer, is there anything that you saw in your examination of that Top Gun Cigarette boat which that collision in that hypothetical would be caused by any type of mechanical problem?"

A. "No, Sir."

Q. "Mr. Benfer, is there anything about that starboard gearshift propensity at times to have difficulty going into reverse that would have caused the collision that I described in the hypothetical?"

A. "No, sir."

The defense did not object to this line of questioning.

The state went on to ask Benfer about cavitation. Benfer testified that he found no evidence of cavitation on

the outdrives. He was then asked how cavitation could play a role in the type of collision described in the hypothetical. Benfer responded that cavitation would have no effect whatsoever on the operation of the boat. The defense objected to this line of questioning on the basis that Benfer was not qualified to give such an opinion.

Benfer was then questioned regarding ventilation. He testified that ventilation is when an air pocket forms around the prop. He testified that when this happens, it causes the engine to rev for a split second and the speed of the boat to decrease for that second. Benfer was asked if ventilation could have caused the collision and he responded that it could not. The defense objected to this line of questioning.

Scott Smith was a customer service manager, warranty manager, and quality control manager for the Cigarette Racing Team in North Miami Beach, Florida, which manufactured appellant's boat. Smith drives all the Cigarette boats manufactured by the Racing Team, approximately ninety per year, for quality control purposes.

Smith was examined by the state regarding whether the alleged problems with the Cigarette boat could have caused it to collide with the Wellcraft. Smith testified that the difficulty with shifting the starboard drive into reverse had nothing to do with the boat's speed which is controlled by the throttles and, therefore, would not have caused the Cigarette boat to collide with the Wellcraft. The defense

did not object to Smith's ability to respond to the hypothetical.

Daniel Clarkson was a manager of the fuel and electrical systems for MerCruiser. MerCruiser made the engine and drive system in appellant's boat. As an engineer and manager for the fuel and electrical systems, Clarkson was responsible for the design and calibration of both the fuel system and the electronics of the engines themselves.

The state asked Clarkson if, pursuant to his inspection and examination of the Top Gun Cigarette boat, there was anything that he saw or discovered to a reasonable degree of engineering certainty from a mechanical or engineering standpoint that would have caused the collision to occur. Clarkson testified that there was nothing that he found that would have caused the situation described to him, i.e., that the Cigarette boat launched over the port side of the Wellcraft. The defense objected to these questions on the grounds of his qualifications.

Rulings concerning the admissibility of expert testimony are within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse. Frank v. Vulcan Materials Co. (1988), 55 Ohio App.3d 153, paragraph two of the syllabus. A witness may be qualified as an expert if:

(1) the witness's testimony relates to matters beyond the verdicts. Specifically, appellant asserts that the jury

verdicts are inconsistent as to their finding of recklessness. According to appellant, since the jury convicted him of vehicular homicide, which is predicated upon negligence, instead of aggravated vehicular homicide, which requires reckless behavior, the jury made a finding that appellant had not acted recklessly in causing the death of Scott Brabander. However, the jury then returned verdicts of guilty as to all of the predicate misdemeanor offenses that established involuntary manslaughter. These misdemeanors required findings that appellant acted recklessly. As such, because the jury found in one instance that appellant did not act recklessly, and then in another that he did act recklessly, he asserts that the jury verdicts were inconsistent and should not have been accepted by the trial court.

It is well-settled that separate counts in an indictment are not interdependent and an inconsistent response to different counts do not create an inconsistent verdict:

> "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count. (Browning v. State, 120 Ohio St. 62, approved and followed.)"

State v. Adams (1978), 53 Ohio St.2d 223, paragraph two of the syllabus. See, also, United States v. Powell (1984), 469 U.S. 57, 65, ("It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.") knowledge or experience of lay persons, (2) the witness is qualified by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony, and (3) the witness's testimony is based on reliable scientific, technical, or other specialized information. Evid.R. 702. The test of the admissibility of expert testimony is whether a particular expert will aid the trier of fact in the search for truth, not whether the expert witness is the best witness on the subject. Ishler v. Miller (1978), 56 Ohio St.2d 447, 453.

In this case, Benfer and Smith had extensive knowledge and experience in boat and engine operation. Clarkson had extensive technical knowledge regarding the workings of fuel and electrical systems. As such, each witness was qualified to testify whether the problems with appellant's boat could have caused the collision described. None of them testified as to what did cause the collision or who was negligent, rather each of their testimony was limited to what effect mechanical problems would have had on the boat's operation. As such, they were not called upon to provide expert testimony as to the cause of the collision.

Upon a thorough review of the record, we find that the trial court did not abuse its discretion in admitting the testimony of Benfer, Clarkson, and Smith. Accordingly, appellant's fourth assignment of error is found not well-taken.

V.

In appellant's fifth assignment of error, he argues that the trial court erred when it accepted inconsistent jury.

Accordingly, even assuming the verdicts are facially at odds, the verdict is not inconsistent because any discrepancy occurs in separate counts, not within the same count. See Adams, supra., Appellant's fifth assignment of error is therefore found not well-taken.

VI.

In his sixth assignment of error, appellant argues that the trial court erred when it presented the jury with an unindicted "additional finding" as to count one, i.e., that appellant was under the influence of alcohol at the time of the offense. As such, appellant asserts that his constitutional rights were violated because he does not have to be held to answering a crime for which the grand jury did not indict. Appellee responds that alcohol consumption with respect to vehicular homicide is an additional finding and not a specification, as suggested by appellant.

Pursuant to the vehicular homicide statute, "[i]f the jury or judge as trier of fact finds that the offender was under the influence of alcohol, *** at the time of the

commission of the offense, then the offenders driver's or commercial driver's license or permit or nonresident operating privileges shall be permanently revoked ***." R.C. 2903.07(B).

The purpose of an indictment is to give the accused person notice that he or she must defend against certain criminal charges and to afford protection from future prosecution for the same offense. State v. Sellards (1985), 17 Ohio St.3d.169, 170. See, also, R.C. 2941.05 and Crim.R. 7(B). In this case, there was no allegation in count one of the indictment that appellant committed aggravated vehicular homicide while under the influence of alcohol. However, in count two of the indictment, appellant was specifically charged with the offense of operating a watercraft under the influence.

Assuming arguendo that the trial court erred in instructing the jury to determine as to count one whether appellant was under the influence of alcohol, the alleged error was harmless. The allegations in both counts of the indictment arose out of the same set of facts and circumstances and, since appellant was charged with being under the influence in count two, he was placed on notice that the state was alleging that he was under the influence at the time of the incident. As such, any error in instructing the jury to make a finding as to whether appellant was under the influence of alcohol during the commission of vehicular homicide was harmless.

Accordingly, this court finds appellant's sixth assignment of error not well-taken.

VII.

In appellant's seventh assignment of error, he argues that his Sixth Amendment right to a fair and impartial jury was violated. Specifically, appellant asserts that he did not have a fair and impartial jury for two reasons: (1) a potential juror had been a member of the U.S. Coast Guard and was questioned about irrelevant matters, such as, the importance of remaining sober while operating a boat, car operation/travel versus boat operation/travel, the effects of drinking alcohol in the sun, and the administration and effectiveness of field sobriety tests; and (2) a seated juror was biased, as evidenced by his negative comments made during the jury selection process.

A potential juror had been a member of the U.S. Coast Guard and was primarily involved in boating safety and law enforcement training for petty officers and officers in the coast guard. Part of his training included boarding procedures and investigation of alleged incidents of boating while intoxicated, which included instruction on administering field sobriety tests. He described the field sobriety tests, as follows:

> "[JUROR]: That's when we have to -- we do that on shore. We tie up the boat, have the person walk on the dock, and they have to do different things, different movements and

> observations, walking in a straight line, using their hands and touch their nose, gaze nystagmus with their eyes, checks on -- checks of that sort to make a determination if the person is impaired."

The juror went on to state that the field sobriety tests were effective in giving a person "probable cause in determining if a person is -- is impaired or not impaired."

The state next questioned the potential juror regarding what is a gaze nystagmus test, whether it involved voluntary or involuntary muscle movement, and how effective the test is in developing probable cause. He responded, "I think it's a tool they can use as part of the other tests that can be used." The state then questioned him concerning why any test needs to be administered at all. The potential juror stated that it was an assessment and that another assessment would be a breathalyzer test. The state questioned him further concerning indications of impairment, which he stated included slurred speech and mannerisms.

At this point appellant objected and argued the following:

> "MR. KIRWAN: - - what the Prosecutor is attempting to do here is to elicit to the jury what the testimony would be, in essence. I mean, he's gone through like gaze nystagmus test. What that means is now

> getting into questions concerning what does that indicate to you. This -- this juror isn't being examined as to what his qualifications for fairness are. He's being used as a tool to instruct the rest of the jury before the trial even begins."

The state responded that it was entitled to inquire of the jurors what they think of when they think of an intoxicated person, what signs do they see. The trial court's solution to appellant's objection was to prohibit the state from using technical terms such as gaze nystagmus test and only speak in layman terms "to feel the jurors out." The state continued questioning this potential juror, but only as to his general experiences, not as to his coast guard experiences. Appellant exercised a preemptory challenge and dismissed this juror.

The purpose of a voir dire examination of a prospective juror is to determine whether he or she has both the statutory qualifications of a juror and is free from bias or prejudice for or against the parties. State v. Crago (1994), 93 Ohio App.3d 621, 641. Crim.R. 24(A) permits the court discretion in determining the method of voir dire and provides in pertinent part that "[t]he court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination." "The scope of voir dire is within the trial

court's discretion and varies depending on the circumstances of each case." State v. Bedford (1988), 39 Ohio St.3d 122, 129. "Any limits placed thereon must be reasonable." Id.

In order to determine the existence of bias or prejudice, it was necessary for the state to determine the extent of the potential juror's knowledge and his opinion regarding the effectiveness of field sobriety tests. Upon review of voir dire, we find that the trial court did not abuse its discretion in allowing the state to question the potential juror in question with respect to his knowledge and opinion of field sobriety tests as such tests were a significant part of this case.

Appellant additionally asserts that he was denied a fair and impartial jury because a seated juror was biased. The allegedly biased juror was brought to the trial court's attention several days into the trial by a juror who was not ultimately seated. The juror stated to the trial court and counsel that a seated juror had made negative comments about the defense team during voir dire and that she felt the seated juror was biased.

The trial court questioned the allegedly biased juror regarding what he had said. The juror stated that whatever comments he made were only jokes. He further stated that the comments were made prior to him being selected as a juror that he felt he could be fair and impartial in deciding appellant's case, and that he had not formed any opinions. The trial court admonished the juror not to make any

further comments regarding the case. Shortly thereafter, the allegedly biased juror was dismissed and replaced with an alternate juror.

Even assuming that the juror's comments equating the defense team to the Three Stooges, and complaints about the speed with which voir dire was proceeding, indicated a prejudice on his part, he did not deliberate to a verdict. Therefore, we find that appellant was not denied a fair and impartial jury.

Accordingly, appellant's seventh assignment of error is found not well-taken.

VIII.

Appellant argues in his eighth assignment of error that the trial court abused its discretion in failing to consider the sentencing criteria of R.C. 2929.12 and by sentencing him to the maximum term of incarceration permitted by law.

Appellant's eighth assignment of error is rendered moot by this court's ruling as to the first assignment of error, remanding the case for resentencing. Upon remand, the trial court will have to reconsider the sentencing criteria for the resentencing, as such, appellant's eighth assignment of error is found not well-taken.

IX.

Appellant argues in his ninth assignment of error that the trial court committed prejudicial, reversible error when it denied his motion to dismiss Count Two,

involuntary manslaughter, and permitted appellee to prosecute appellant for both aggravated vehicular homicide and involuntary manslaughter. Appellant asserts that the inclusion of both charges violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, and 16, Article I, Ohio Constitution.

Based on the majority opinion in State v. Chippendale (1990), 52 Ohio St.3d 118, and our discussion as to Assignment of Error Number One, appellant's ninth assignment of error is found not well-taken.

X.

Appellant argues in his tenth assignment of error that he was denied a fair trial because the trial court allowed into evidence testimony regarding appellant's character, in contravention to Evid.R. 401, 402, 403 and 404. Specifically, appellant refers to testimony regarding appellant's "alleged watercraft piloting behavior and drinking behavior on occasions removed by time and location from the accident in question." Appellant asserts that he did not testify in his own defense and, therefore, character testimony should have been excluded. He also asserts that any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading the jury.

Without specific reference to the transcript, this court can only speculate on the testimony appellant calls

into question. The jury was presented with testimony regarding what appellant was drinking prior to the collision, e.g., Bob Vitt and Sheila Sikora testified that appellant was drinking between 10:30 and 11:00 a.m. at the Casino and Rory Kaip testified that he served appellant and Ron Liguzinski each a Sidecar at the Twine House. Appellant's piloting of his boat after he began drinking was also called into question, e.g., Michael Hutsler testified that appellant took off at a high rate of speed, approximately thirty-five feet from the dock at the Casino, when leaving Kelley's Island at 11:30 a.m., Martin Fuchs testified that appellant's boat ran into "Bad Dog" when appellant was leaving Kelley's Island around 11:30 a.m., and Sheila Sikora testified that appellant traveled fast through a no wake zone on the Huron River while approaching Twine House. And, finally, Lauren and Kenneth Helbling and Michael Hutsler testified that people on the boat were pouring a gold liquid out of cups over the side of the boat after the collision.

The trial court has broad discretion in the admission of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, appellate courts should be slow to interfere." State v. Jenks (1991), 61 Ohio St.3d 259, 281, citing, State v. Maurer, (1984), 15 Ohio St.3d 239, 265. Evid.R. 404(B) provides in pertinent part that:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a

person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

"Prosecutors and trial courts should be particularly aware that evidence of other acts of a defendant is admissible only when it 'tends to show' one of the matters enumerated in the statute and only when it is relevant to proof of the guilt of the defendant of the offense in question." (Emphasis in original.) State v. Burson (1974), 38 Ohio St.2d 157, 158.

In this case, the testimony presented was relevant as to the question of whether appellant was intoxicated at the time of the incident. Testimony regarding his consumption of alcoholic beverages prior to the incident and his ability to operate his boat after drinking alcoholic beverages are all probative of whether appellant was intoxicated at the time of the collision and whether he was operating his boat recklessly or negligently because of such alleged intoxication.

The testimony in question all related to evidence of alcohol consumption or intoxication on the day in question. As such, the testimony was not offered as character evidence to prove that appellant acted in conformity with behavior which occurred on some other occasion. Furthermore, upon reviewing the entire record, this court

finds that the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.

Accordingly, we find that the trial court did not abuse its discretion in allowing the state to question witnesses regarding appellant's "drinking" and "piloting" on the day in question. Appellant's tenth assignment of error is therefore found not well-taken.

XI.

Appellant argues in his eleventh assignment of error that the trial court erred in permitting the state to cross-examine defense witnesses by using grand jury transcripts of their prior testimony.

The disclosure of grand jury testimony is governed by Crim.R. 6(E) and the release of any such testimony for use prior to or during trial is within the discretion of the trial court. State v. Greer (1981), 66 Ohio St.2d 139, paragraph one of the syllabus. Crim.R. 6(E) states that, except for deliberations of the grand jury and the vote of any grand juror, "[d]isclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties." The rule further states that "[a] *** prosecuting attorney *** may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, *** in connection with a judicial proceeding." Crim.R. 6(E). "If the State chooses to impeach a defense

witness with his grand jury testimony, then the defendant has a right, upon timely request, to view the relevant portions of the witness' [sic] grand jury testimony in order to confirm the alleged contradiction." State v. Hoofer (July 12, 1996), Montgomery App. No. 15345, unreported.

In this case, the state used the grand jury testimony of two defense witnesses during cross-examination. Specifically, the state used Sandra Hooper's grand jury testimony to examine her concerning allegedly inconsistent trial testimony regarding how many drinks were brought upon appellant's boat, whether appellant adjusted his throttles during the trip back to Kelley's Island, and whether she told the grand jury that the throttles were stuck. Additionally, the state used Ronald Liguzinski's testimony during cross-examination regarding whether appellant brought a drink onto his boat when they were leaving the Casino at Kelley's Island and whether it would take a boat traveling twenty to twenty-five miles per hour, two hundred to two hundred fifty feet to stop.

During the cross-examination of these witnesses, the defense did not object to the use of the grand jury testimony. Rather, the only objection made was that the jury should be told that the grand jury process is an intimidating formal proceeding and that the defense is not present. Moreover, a copy of the relevant portions of the grand jury proceedings being used during cross-examination was provided to the defense.

Based on the foregoing, we find that the trial court did not err in permitting the state to cross-examine defense witnesses with their grand jury testimony. The state is permitted to use such testimony in judicial proceedings and the defense was provided a copy of the relevant testimony. See Crim.R. 6(E) and State v. Hopfer, supra.

Accordingly, appellant's eleventh assignment of error is found not well-taken.

XII.

Appellant argues in his twelfth assignment of error that his rights were violated when the state altered the positioning of the controls of appellant's watercraft and tampered with evidence.

The United States Supreme Court held in Arizona v. Youngblood (1988), 488 U.S. 51, 57, that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

In Ohio, anyone who violates R.C. 2921.12 is guilty of tampering with evidence. R.C. 2921.12 states, in part:

> "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to

impair its value or availability as evidence in such proceeding or investigation;

"(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation."

Mike Benfer, a mechanic at Winke's, was asked by the ODNR to determine if there was a problem with the throttles of appellant's boat. Benfer examined appellant's boat while Officer Steinbauer of the ODNR videotaped.

Benfer testified that he started the engines on appellant's boat one at a time because it was on dry dock and a hose had to be connected to the engine in order to run it. He moved the throttles and the drives to test their operation. Benfer testified that the throttles moved freely, but the starboard drive had an intermittent difficulty shifting into reverse. Benfer found a loose cable connector which could have accounted for the shifting trouble.

Benfer testified that he was going to tighten the cable to determine if it was the cause of the shifting problem:

"My next step in troubleshooting why that gear case shifted hard would have been to tighten that piece up and go back to the

> control handle and shift it and see if that solved the problem. That was what I was going to attempt to do. At that point, Mr. Steinbauer said no, let's not change anything, let's leave it like it was and that's what we did."

The video showed Benfer attempting to tighten the cable. Benfer testified that it was a hex nut and that he only turned it one flat, i.e., one-sixth of a turn, and that the cable was still in the same loose state in which he had originally found it.

We find that appellant's due process rights were not violated. See Youngblood, supra. There is no showing that the state acted in bad faith by requesting that the throttles be moved in order to determine their ability to operate. Nor is there any showing of bad faith with respect to Benfer turning the hex nut one flat. The fact that these things were done were never concealed from appellant as the video tape of Benfer's examination was provided to appellant. Accordingly, we find that there was no violation of the Due Process Clause.

Additionally, there is no showing that Benfer intended to alter, destroy, or conceal any item, with the purpose of impairing its value or availability as evidence. Benfer candidly testified that he was "troubleshooting," in that he was attempting to determine the cause of the problem with the starboard drive when he started to tighten

the nut. As far as the movement of the throttles, the record is devoid of any indication that this was requested by the ODNR or done by Benfer in an attempt to alter, destroy, or conceal, evidence. Accordingly, we find that no one tampered with the evidence in this case. See R.C. 2921.12.

Accordingly, we find appellant's twelfth assignment of error not well-taken.

XIII.

Appellant argues in his thirteenth assignment of error that the verdicts were against the manifest weight of the evidence and contrary to law.

Appellant was found guilty of vehicular homicide, in violation of R.C. 2903.07, and involuntary manslaughter, in violation of R.C. 2903.04(B), as a proximate result of committing one or more of the following misdemeanor offenses: operating a watercraft while under the influence, a violation of R.C. 1547.11(A) (1); reckless operation, a violation of R.C. 1547.07; safe speed, a violation of Ohio Adm.Code 1501:47-2-06; action to avoid collision, a violation of Ohio Adm.Code 1501:47-2-08; and crossing situation, a violation of Ohio Adm.Code 1501:47-2-15.

In State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, the Ohio Supreme Court set forth the standard applied in determining whether a criminal conviction is against the manifest weight of the evidence:

> "An appellate court's function when reviewing the sufficiency of the evidence to

> support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (Jackson v. Virginia [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

With respect to appellant's conviction of the crime of vehicular homicide, R.C. 2903.07 states that anyone who negligently causes the death of another while operating or participating in the operation of a watercraft is guilty of vehicular homicide, a misdemeanor of the first degree.

In this case, the jury heard testimony that appellant had been drinking Sidecars between 10:00 a.m. and, as late as, 3:00 p.m., that he was traveling fifty m.p.h. approximately one hundred yards from the dock area at Kelley's Island, that he was turned around in his bolster seat talking to the occupants of his boat, that he noticed the Brabander boat just before the collision, that he pulled back on the throttles, slowing the boat to twenty-five to forty m.p.h., thereby causing the boat's bow to porpoise up and

hit the Brabander boat on the port side, fly over it, and land in the water on the other side.

The jury also heard testimony that Scott Brabander died as a result of multiple blunt force injuries, resulting in twelve broken ribs and a lacerated pulmonary artery and airway. Dr. Cynthia Beisser testified that the injuries were a result of a heavy blow to the left side of Scott's back, not merely from hitting the water or jumping out of a boat--"he would have had to fall on something very hard or something hit him very hard."

Based on the evidence in this case, we find that there is evidence upon which a jury could rely to find that appellant negligently caused the death of Scott Brabander while operating a watercraft. As such, we find that after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of vehicular homicide proven beyond a reasonable doubt. See Jenks, supra.

In order for appellant to be convicted of involuntary manslaughter, pursuant to R.C. 2903.04(B), the evidence must show that appellant caused the death of another as a proximate result of committing or attempting to commit a misdemeanor of the first, second, third, or fourth degree or a minor misdemeanor. In this case, there were five misdemeanor charges for which appellant was found guilty.

Appellant was first found guilty of operating a watercraft while under the influence of alcohol in violation

of R.C. 1547.11(A) (1), which provides that no person shall operate or be in physical control of any vessel underway while under the influence of alcohol. "'[O]perate' means that a vessel is being used on the water in this state when the vessel is not securely affixed to a dock or to shore or to any permanent structure ***."

In this case, the uncontroverted evidence was that appellant was driving his boat at the time of the collision. The jury also heard testimony that appellant was drinking alcoholic beverages prior to the collision; Bob Vitt testified that appellant drank tow Sidecars from 10:30 a.m. to 11:00 a.m. at the Casino on Kelley's Island; sheila Sikora testified that she saw appellant consuming a Sidecar at the Casino; and Rory Kaip testified that he made at least one Sidecar for appellant at the Twine House.

The jury also heard evidence that appellant was observed to be intoxicated after the collision: Brian Hoke testified that within one-half hour after the collision, appellant had trouble keeping his balance while walking, smelled of alcohol, and had bloodshot eyes and a flushed face. Hoke, a third class petty officer in the U.S. Coast Guard also testified that appellant failed the field sobriety test administered at the Kelley's Island police station. Hoke testified that appellant incorrectly performed the field sobriety test, as follows: (1) appellant sang the ABC's rather than speaking them; (2) he hesitated between numbers when counting from twenty-five to one; (3) he was

unable to touch his thumb to his fingers while counting from one to four--his fingers slid around, he miscounted and he did not speed up his counting during the test as instructed; (4) he failed in his performance of the palm pat test because his hands slid around, he did not lift his hands high enough, he hesitated, and he did not speed up during the examination as instructed; (5) he incorrectly performed the finger to nose test by missing his nose, opening his eyes, hesitating, and using the wrong finger; (6) appellant was unable to walk heal to toe for nine steps, while counting, in a straight line--he lost his balance, started before he was told to begin, turned improperly, and raised his arms to keep his balance; (7) had some trouble keeping his balance while standing on one foot and counting to thirty; and (8) appellant failed a horizontal gaze nystagmus test ("HGN") when four of the six possible indicators of intoxication were found to be present. Based on his observations and the results of the field sobriety test, Hoke testified that appellant was intoxicated.

The jury also heard the testimony of Officer John Johnston of the ODNR. Johnston testified that he first encountered appellant at the Kelley's Island police station where he noted a strong odor of alcoholic beverages, bloodshot eyes and a flushed face. Johnston also performed a HGN test and found six out of six indicators of intoxication, i.e., lack of smooth pursuit in both eyes,

nystagmus (jerking at maximum deviation) in both eyes, and nystagmus before forty-five degrees in both eyes.

Based on the evidence in this case, we find that a rational trier of fact could have found that appellant was operating his watercraft while under the influence of alcohol.

Appellant was also found guilty of recklessly operating a vessel, in violation of R.C. 1547.07(A) which states that "[a]ny person who operates any vessel *** on the waters in this state carelessly or heedlessly, or in disregard of the rights or safety of any person, vessel, or property, or without due caution, at a rate of speed or in a manner so as to endanger any person, vessel, or property is guilty of reckless operation of the vessel or other device."

John Brabander testified that appellant's boat was traveling fifty m.p.h. approximately one hundred yards from the dock at Kelley's Island. Dick Layland testified that appellant's boat was traveling forty-five to fifty m.p.h. one-quarter mile from the dock, that appellant was driving and was turned sideways with his left arm around the back of his seat talking with the passengers on his boat, and that two to two-half boat lengths from the Brabander's boat, appellant turned around forward, put his hand on the throttle and pulled down, slowing the boat to thirty-five m.p.h. immediately before impact. William Leachman testified substantially the same as Layland, but had appellant pulling back on the throttles three to four boat

lengths from the Brabander's boat, thereby slowing the boat to thirty-five to forty m.p.h. at time of impact.

Based on the evidence in this case, a rational trier of fact could find that the essential elements of reckless operation were proven beyond a reasonable doubt, i.e., that appellant operated his vessel carelessly or heedlessly, or in disregard of the rights or safety of any person, vessel, or property, or without due caution, at a rate of speed or in a manner so as to endanger any person, vessel, or property.

Appellant was also found guilty of failing to operate his vessel at a safe speed, in violation of Ohio Adm.Code 1501:47-2-06, which provides that no person shall operate or permit to be operated, any vessel on the waters in this state, in violation of this rule:

> "Every vessel shall at all times proceed at a safe speed so that it can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed, traffic density and maneuverability are factors to be taken into account. Ohio Adm.Code 1501:47-2- 06(A). "For the purposes of this rule the term 'collision' includes every description of accident or casualty either intentional or unintentional." Ohio Adm.Code 1501:47-2-06.

Ron Liguzinski testified upon cross-examination that even traveling twenty to twenty-five m.p.h., appellant's boat

would have taken two hundred to two hundred fifty feet to stop. Witnesses testified that appellant pulled back on the throttles between two and four boat lengths from the Brabander's boat, leaving appellant with only seventy-six to one hundred fifty two feet within which to stop his boat. Based on the testimony in this case, a rational trier of fact could find that appellant failed to proceed at a safe speed so that he could have taken proper and effective action to avoid the collision with the Brabander's boat.

The jury also found appellant guilty of failing to avoid a collision, in violation of Ohio Adm.Code 1501:47-2-08, which states that no person shall operate any vessel on the waters in this state, in violation of this rule:

> "(A) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.
>
> "(B) Any alteration of course or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course or speed should be avoided.
>
> "(C) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation

provided that it is made in good time, is substantial and does not result in another close-quarters situation.

"(D) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

"(E) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken its speed or take all way off by stopping or reversing its means of propulsion."

In this case, there was ample testimony upon which a rational trier of fact could rely to find that appellant failed to avoid a collision with the Brabander's boat. It was a clear day, by everyone's account. Because witnesses at the Casino spotted appellant one hundred yards or further from the dock, a jury could find that appellant could have seen the Brabander's boat an equal distance away and, therefore, would have had time to alter his course, or stop, in order to avoid the collision.

The jury also found appellant guilty of violating a crossing situation as set forth in Ohio Adm.Code 1501:47-2-15, which provides that no one shall operate any vessel in violation of this rule:

"(A) When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on its starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel. ***"

Officer Johnston testified that a vessel must yield the right of way to any other vessel which is directly ahead or off to the starboard side. In this case, the evidence supports that the Brabander's boat was directly in the path of appellant's boat and was struck on the port side. As such, a rational trier of fact could find that appellant violated a crossing situation by failing to avoid the Brabander's boat which had the right-of-way.

Notwithstanding the fact that appellant argued that his throttles stuck, making the collision unavoidable, there was ample evidence that, if believed, would convince the average mind of appellant's guilt beyond a reasonable doubt. As such, after a thorough review of the record, we find that there is evidence upon which a rational jury could rely to find that appellant operated his vessel while under the influence of alcohol, recklessly operated his vessel, did not operate within a safe speed, failed to avoid a collision, and violated the rule with respect to a crossing situation. Accordingly, we find that after viewing the evidence in a light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crimes proven beyond a reasonable doubt. See Jenks, supra.

Since the misdemeanor convictions are supported by the evidence in this case, so also is appellant's conviction as to involuntary manslaughter. There is ample evidence upon which a rational jury could rely to find that violating the above misdemeanor offenses proximately caused the death of Scott Brabander.

Accordingly, we find that the verdicts were not against the manifest weight of the evidence. Appellant's thirteenth assignment of error is therefore found not well-taken.

XIV.

Appellant argues in his fourteenth assignment of error that the cumulative effect of all the alleged assignments of error denied appellant his right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as Sections 10 and 16, Article I, Ohio Constitution.

Generally, although singular violations of the Rules of Evidence during trial may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial. State v. DeMarco (1987), 31 Ohio St.3d 191, paragraph two of the syllabus.

This court has thoroughly examined and ruled on each assignment of error presented by appellant. Having

found a problem only with the trial court's sentencing, we find no cumulative effect of errors that would have violated appellant's right to a fair trial. Accordingly, appellant's fourteenth assignment of error is found not well-taken.

CONCLUSION

On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial; however, we find that the trial court erred in sentencing. Therefore, the judgment of the Erie County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to the trial court for resentencing consistent with this opinion. Court costs of this appeal are assessed to appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

State v. Ollie Mastronardi
C.A. No. E-96-033

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also 6th Dist.Loc.App.R. 4, amended 7/1/92.

Peter M. Handwork. J.	/s/ Peter M. Handwork
	JUDGE
George M. Glasser, J.	/s/ George M. Glasser
	JUDGE
Richard W. Knepper. J.	/s/ Richard W. Knepper
CONCUR.	JUDGE